Office-Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-629

In the Supreme Court of the United States

October Term, 1982

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., AND SCHMIDT, SMITH & RUSH, P.C.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

OBJECTION OF RESPONDENT, WOLD ENGINEERING TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

HUGH McCUTCHEON
(Counsel of Record)
BOSARD, McCUTCHEON & RAU, LTD.
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702-0939
Counsel for Respondent, Wold Engineering, P.C.

August, 1983

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

1. Whether the Motion For Leave To File an Amicus Brief of Turtle Mountain meets the requirements of Rule 36 of the Rules of the Supreme Court of the United States.

TABLE OF CONTENTS

QUESTION PRESENTED I
TABLE OF CONTENTS III
TABLE OF AUTHORITIES III
STATEMENT OF THE CASE 1
SUMMARY OF THE ARGUMENT 2
ARGUMENT 2
CONCLUSION 8

TABLE OF AUTHORITIES

Rule 36, Supreme Court of the United States 2

No. 82-629

In the Supreme Court of the United States

October Term, 1982

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., AND SCHMIDT,
SMITH & RUSH, P.C.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

OBJECTION OF RESPONDENT, WOLD ENGINEERING TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

STATEMENT OF THE CASE

The Turtle Mountain Band of Chippewa Indians, hereafter referred to as Turtle Mountain, have requested, via telephone, permission from Wold Engineering to file a brief as amicus curiae in support of Petitioner. Turtle Mountain asserts that its tribal members would be affected by the Supreme Court's decision in this case. Wold determined that the reasons stated by Turtle Mountain were insufficient to justify the filing of amicus briefs and therefore withheld its consent.

Turtle Mountain now makes its Motion, and has filed a supporting brief for permission of this Court to file. Wold objects to this Motion.

SUMMARY OF THE ARGUMENT

Respondent, Wold Engineering, asserts that Turtle Mountain has failed to comply with Rule 36.3 of the Rules of the Supreme Court of the United States and should therefore be denied leave to file a brief as amicus curiae. Rule 36.3 provides, in relevant part,

> "The motion shall concisely . . . set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, . . ."

Turtle Mountain has failed to set forth any facts or questions of law that have not been presented by the parties. Likewise, Turtle Mountain has failed to set forth reasons for believing the facts and questions of law set forth in its motion will not be adequately presented by the parties. Turtle Mountain should therefore be denied leave to file its amicus brief.

ARGUMENT

The facts and questions of law set forth in the argument of Turtle Mountain are fully presented in Three Affiliated Tribes' brief.

Turtle Mountain's motion asserts as its interest tribal access to State Court. Three Affiliated Tribes' brief addresses the identical argument.

The specific facts and questions of law advanced by Turtle Mountain are adequately presented by Three Affiliated Tribes as follows below.

Turtle Mountain, in its motion and in its brief at §IA argues that in reaching its decision in the present case the

North Dakota Supreme Court incorrectly relied on the premise that P.L. 280 and United States Supreme Court decisions compelled or authorized the State Court holding. Section IIA of Three Affiliated Tribes' brief on the merits argues:

> "The North Dakota Supreme Court regarded federal Indian law, particularly P.L. 280 and the decisions of this court interpreting that statute, as compelling or authorizing the result below." (Pet. p. 10).

The arguments differ in form only, and no new argument is presented by Turtle Mountain. Turtle Mountain's brief §IB asserts that United States Supreme Court decisions in this area establish that:

> "Indian defendants in Indian country are not subject to state jurisdiction unless congress authorizes it, but non-Indian defendants in Indian country are subject to state jurisdiction unless a federal statute or treaty pre-empts state jurisdiction or state jurisdiction would interfere with the Indians' right to make their own laws and be ruled by them." (Amic. p. 24).

Based on this premise, Turtle Mountain concludes that the North Dakota Supreme Court did not and could not sustain its decision. For that Court to hold otherwise would be an infringement on tribal self government and therefore the court must have based its decision on P.L. 280. (Amicus p. 25). Three Affiliated Tribes' brief §IIC entitled, "There Is No Federal Decisional Rule Barring Petitioners Action In State Court" (Pet. p. 16), concludes,

> "The state supreme court has misapplied the federal standard developed in *Williams* in interpreting that rule as to require an absolute bar against Indian claims when those claims implicate no overriding federal or tribal interests in any way."

Therefore, Turtle Mountain's brief §IB is but a cumulative replay of Three Affiliated Tribes' argument in its brief §IIC.

Turtle Mountain's brief §IC asserts: The North Dakota Supreme Court has read P.L. 280 to authorize or compel the court to withdraw pre-existing jurisdiction over civil actions arising in Indian country against non-Indians of the State. Further, the purpose of P.L. 280 was to increase, not decrease jurisdiction in this area and the wording of §§6 and 7 of P.L. 280 (Civil 25 U.S.C. 1332) allows the state to assume jurisdiction. The legislative history referred to by this Court's decisions shows that P.L. 280 was concerned only with the assumption of jurisdiction, not with withdrawal of pre-existing jurisdiction. The argument concludes therefore that P.L. 280 cannot be construed to authorize or compel the state to withdraw jurisdiction.

Three Affiliated Tribes' brief §IB argues that prior to enactment of Chapter 27-19 (enacted as a reaction to P.L. 280) jurisdiction existed in North Dakota courts to hear Indian suits arising from reservation transactions. Three Affiliated Tribes' brief §IIB argues:

> "P.L. 280 has been construed as effecting only the limited withdrawal of federal control or pre-emption in specific subject matter areas so that the states accepting jurisdiction under that statute would be free to exercise their legislative or judicial jurisdiction in those areas." (Pet. p. 20).

Therefore Three Affiliated Tribes concludes P.L. 280 is irrelevant to whether the North Dakota courts have jurisdiction over this type of action. (Pet. p. 27). Turtle Mountain's brief §IC adds nothing new to this argument.

Turtle Mountain's brief §ID concludes §I of its brief by arguing that Chapter 27-19, NDCC, denies rather than assumes jurisdiction. Turtle Mountain argues that P.L. 280 did not authorize this denial and therefore the North Dakota Supreme Court's reliance on the legislature's response to P.L. 280 was misplaced. (Amic. p. 39). Three Affiliated Tribes reaches the same result on this issue in its brief where it concludes:

> "Consequently, the fundamental condition for the validity of the state jurisdictional pattern—set forth at Chapter 27-19 of the state judicial code—as a federally delegated exercise of jurisdiction over Indians is that the state comply with §7 of P.L. 280. This court's decision in *Kennerly* confirms that North Dakota did not. . . . The state's failure to comply with the plain requirement of §7 of the federal statute defeats the state court's contention that the state statute is a federally sanctioned jurisdictional rule compelling the Indians to consent to state jurisdiction before they can have access to state courts." (Pet. p. 34).

Section IC of Turtle Mountain's brief presents no new issue of fact or law, and therefore fails to satisfy the requirements of this Court's rules.

No new facts or questions of law are set forth in Part II of Turtle Mountain's brief. Turtle Mountain argues that North Dakota's denial of jurisdiction over this matter violates 42 U.S.C. §1981; the equal protection of law; and, due process of law. Three Affiliated Tribes covers these identical issues in its brief in §IVA. Turtle Mountain offers no new insight into the resolution of these issues, and its brief is a useless act.

Turtle Mountain's brief §IIB1 argues the North Dakota Supreme Court relied on *Washington v. Yakima In-*

dian Nation, 439 U.S. 463, to sustain the North Dakota laws at issue here. This reliance, Turtle Mountain argues, was misplaced because the Washington law upheld in *Yakima* was within the scope of P.L. 280 and authorized by it. Therefore, Turtle Mountain states the state law has no rational basis and the North Dakota decision denies Three Affiliated Tribes equal protection of the state's laws.

Three Affiliated Tribes' brief §IIIA on this same issue states:

> "The state statute, Chapter 27-19 of the North Dakota Century Code, given that it represents neither a federally compelled or authorized federal judicial rule over Indian affairs, then did not alter, as a matter of federal law, the existing state judicial authority before the enactment of P.L. 280." (Pet. p. 34).

Based on this statement Three Affiliated Tribes then distinguishes the present case from *Yakima*. The issues and their disposition are identical. Three Affiliated Tribes has therefore presented the argument of §IIB1 of Turtle Mountain's brief. Further argument on this point by Turtle Mountain is a repetitious and useless act.

Turtle Mountain's brief §IIB2 asserts that state law denying access to its courts denies due process of law unless justified by "the magnitude of the governmental interests involved." Turtle Mountain concludes that since no significant interest of the state is identified in the opinion below that therefore the state's action denies Petitioner and others similarly situated due process of law.

Three Affiliated Tribes' brief §IVA argues:

> "Chapter 27-19 of the state judicial code bars the adjudication by state courts of cases involving Indian

parties and arising on an Indian reservation in the state."

Three Affiliated Tribes concludes, citing the same authority as is cited by Turtle Mountain, the state court's decision denying it and all other Indian plaintiffs an opportunity to be heard on any claim arising on a reservation is clearly violative of due process. Three Affiliated Tribes has fully argued the point advanced by Turtle Mountain in §IIB2 of its brief.

CONCLUSION

All facts and questions of law set forth by Turtle Mountain in its brief have been presented by Three Affiliated Tribes in this action. Turtle Mountain states no reasons for believing that facts and questions set forth will not adequately be presented by other parties to the action, and its argument in brief is a repetition of the brief of Three Affiliated Tribes. Turtle Mountain has failed to satisfy Rules of the Supreme Court of the United States. The filing of Turtle Mountain's brief will not aid this Court in the resolution of the issues presented, and offers no new issues of law or fact. Turtle Mountain's brief merely parallels the brief of Three Affiliated Tribes, and the filing of Turtle Mountain's brief as amicus curiae ought to be prohibited.

Respectfully submitted this 11th day of August, 1983.

BOSARD, MCCUTCHEON & RAU, LTD.
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702-0939
Attorneys for Wold Engineering

By: HUGH MCCUTCHEON